

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 61379-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
TAIWANDRIC LATREZ RUSSELL,	)	
AKA KESHUNDREL RUSSELL,	)	
	)	
Appellant.	)	FILED: October 5, 2009

Grosse, J. — Where the State presents sufficient evidence to support each alleged alternative means of committing a single charge of witness tampering as a course of continuing conduct over more than 100 telephone calls during a period of several weeks, the trial court is not required to give unanimity instructions regarding the means of the commission of the crime or specific acts involved. Because Taiwandric Russell fails to demonstrate any error with regard to the lack of unanimity instructions, the trial court's instructions regarding second degree assault, or the trial court's decisions at sentencing, we affirm.

### FACTS

Shortly after midnight on October 14, 2007, police responded to an emergency call and found Felicia Phillips, shaking, scared and crying hysterically. Phillips had blood running down her face, swelling on her cheek and the side of her head, and had marks on her neck consistent with strangling. Phillips told police that her son's father, Taiwandric Russell, had punched her in the head and face 10 to 15 times, choked her three times, and threatened to kill her. Police arrested Russell later that morning and

booked him into jail. Despite his knowledge of an order prohibiting him from contacting Phillips, Russell called Phillips from the jail over 100 times between October 22 and December 7, 2007.

The State charged Russell with second degree assault, witness tampering and four counts of misdemeanor violation of a court order. At trial, Phillips testified that she and Russell had been arguing when she pushed him and they started fighting each other. She denied being choked by Russell. Russell testified and admitted to knowing of the no-contact order and to making over 100 telephone calls to Phillips from the jail. The State played portions of recordings of several calls. The jury found Russell guilty as charged. The trial court imposed a standard range sentence.

Russell appeals.

#### ANALYSIS

Russell first challenges his conviction for tampering with a witness, arguing that the verdict lacked unanimity with regard to the means of commission.

When an offense may be committed by more than one means, the jury need not be unanimous as to which means was proved so long as substantial evidence supports a finding under each means.<sup>1</sup> Here, the jury was instructed that a person may tamper with a witness by attempting to induce a witness to either (1) testify falsely or withhold any testimony, or (2) absent herself from any official proceedings. To prove an attempt to testify falsely, the State is not limited to the literal meaning of the words used by the defendant, but is entitled to rely on their inferential meaning as well as the context in

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<sup>1</sup> State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

which they were used.<sup>2</sup>

Citing State v. Rempel,<sup>3</sup> Russell argues that the State failed to present substantial evidence to support a finding that Russell attempted to induce Phillips to testify falsely. He also contends that the State failed to present sufficient evidence that Russell threatened Phillips or offered her any reward as an inducement, such that neither alternative means was established. In Rempel, the court held that the defendant's apology, a statement that it was going to ruin his life, and a request that the victim drop the charges, did not amount to a request to withhold testimony or a threat or promise to induce the victim to withhold testimony.<sup>4</sup>

Here, in recordings of several calls from the jail, the State presented evidence that Russell told Phillips to "give 'em the whole little breakdown," and say that at midnight, she "got into it with another broad" and "was mad 'cause [Russell] didn't leave with [her] and so she . . . said it was [Russell]." Russell also asked Phillips to prepare a notarized letter saying she was sorry for lying about him. At other times he told her not to come to court or to move out of the state and said that the State could not go to trial without a witness. During various calls, Russell promised to change, expressed love and appreciation, and harshly directed her to "quit playing" with him and to "bow down," or find that "all [her] business is going to be on the street."

This evidence is sufficient to support a finding of tampering with a witness under

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<sup>2</sup> State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

<sup>3</sup> 114 Wn.2d 77, 84, 785 P.2d 1134 (1990).

<sup>4</sup> Rempel, 114 Wn.2d at 83-84 ("We do not hold that the words 'drop the charges' cannot sustain a conviction if uttered in a factual context which would lead to a reasonable inference that the speaker actually attempted to induce a witness to withhold testimony. Given the context here, however, we conclude that no such inference can be drawn. The evidence does not support the conviction.").

either alternative means in the instruction. The verdict did not need to specify which means the jury relied upon and Russell was not deprived of his right to a unanimous jury on this ground.

Russell next contends that the trial court erred by failing to give a Petrich<sup>5</sup> instruction requiring the jury to unanimously agree on the specific criminal act that the State proved beyond a reasonable doubt to support the witness tampering charge.

Where the State presents evidence of a “continuing course of conduct” rather than several distinct criminal acts, a Petrich instruction is not required.<sup>6</sup> To determine whether criminal conduct constitutes one continuing act, we must evaluate the facts in a “commonsense manner.”<sup>7</sup> Although evidence of conduct at different times and places tends to show several distinct acts, evidence that the defendant engaged “in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts.”<sup>8</sup>

Here, the State charged Russell with tampering with a witness “during a period of time intervening between October 22, 2007 through December 7, 2007.” The State presented recordings of portions of a number of calls at trial to demonstrate that Russell made various suggestions for Phillips’ potential testimony or lack thereof in several phone calls and made certain encouraging or coercive statements in other calls. The jury instructions directed the jury to consider “the intervening period of October 22, 2007 to December 7, 2007” to reach a verdict on the charge. In closing

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<sup>5</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

<sup>6</sup> Petrich, 101 Wn.2d at 571.

<sup>7</sup> Petrich, 101 Wn.2d at 571.

<sup>8</sup> State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

argument, the prosecutor asked the jury to consider “the hour and a half” of recordings of calls occurring between October 22 and December 7 to return a guilty verdict on the charge.

The State charged, presented evidence, and argued for conviction on the witness tampering charge based on the entire series of calls over the course of several weeks. When viewed in a commonsense manner, the facts as presented at trial tend to show that Russell engaged in a continuing course of conduct to secure the same objective—to keep Phillips from testifying at trial consistently with her original statement to the police. A Petrich instruction was not required.

We also reject Russell’s claim that the four counts of misdemeanor violation of a court order required a Petrich instruction. As charged, each of the four counts included a specific date. During cross-examination, Russell admitted to making a call on each of those four dates in violation of the no-contact order. The jury instructions listed a specific date for each count. Finally, the prosecutor argued that Russell admitted to a separate violation on each of the particular dates identified in the information and the instructions. The State clearly elected specific criminal acts for each count.

Russell next claims that the State failed to present sufficient evidence of “substantial bodily harm”<sup>9</sup> to support his second degree assault conviction. The key question is whether, when viewed in the light most favorable to the State, the evidence presented would allow any rational trier of fact to find beyond a reasonable doubt that Phillips suffered “bodily injury which involves a temporary but substantial

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<sup>9</sup> RCW 9A.36.021(1) provides in pertinent part: “A person is guilty of assault in the second degree if he . . . (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm.”

disfigurement.”<sup>10</sup>

Officer Thomas Clark testified that Phillips’ head was bleeding, her face was swelling, and she had obvious injuries on her neck that appeared to be consistent with strangulation. The State also introduced several pictures of Phillips’ face and neck taken shortly after the incident that are consistent with Officer Clark’s testimony. Officer Clark also testified that Phillips claimed at the time that she had been repeatedly punched and choked. Dr. Milne, who treated Phillips at the hospital, testified that Phillips had abrasions and a two-centimeter laceration on her scalp that he closed with staples. During one of Russell’s calls from the jail, Phillips indicated that she was sent home from work “because of [her] face.” Taken together, this evidence would allow a rational trier of fact to find that Phillips suffered temporary but substantial disfigurement.<sup>11</sup>

In the alternative, Russell argues that the prosecutor committed prejudicial misconduct by arguing that the medical staples used to treat Phillips’ head wound constituted disfigurement for the purposes of the assault charge.

Failure to object to an allegedly improper remark waives a claim of prosecutorial misconduct unless it was so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”<sup>12</sup> Russell did not object to the portion of the prosecutor’s argument that he now claims is

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<sup>10</sup> RCW 9A.04.110(4)(b); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

<sup>11</sup> See, e.g., State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (doctors’ testimony that they saw bruise marks consistent with being hit with a shoe indicated temporary but substantial disfigurement).

<sup>12</sup> State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

misconduct.<sup>13</sup> Russell does not argue or establish that the comments were flagrant and ill-intentioned, but merely claims that the prosecutor misstated the law and argued facts not in evidence. Russell fails to explain how an admonition to the jury could not have neutralized any prejudice caused by the comments, especially given the fact that the State introduced several photographs showing the extent of Phillips' injuries. Russell fails to establish grounds for relief.

Finally, Russell argues that the trial court abused its discretion by refusing to rule on his motion under RCW 9.94A.589 to run his sentence concurrently with a particular probation violation. But Russell's description of the record is not accurate. At the sentencing hearing, defense counsel stated that "[Russell] may be on probation for another case[,] I don't know" and expressed concern that the judgment and sentence indicated that the current sentence would run consecutively to any time for probation violations imposed in any other case. The trial court stated, "I'm not making any reference to any other outstanding things that he may be on probation for. So you can cross that out."

Whether the current sentence must be served consecutively to or concurrently

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<sup>13</sup> The prosecutor argued:

To Felicia, staples in the head lasting for ten days, eight to ten days was a substantial disfigurement.

Knowing that night that a head was split open, substantial disfigurement.

Having those staples being taken out after them being in for eight to ten days is substantial disfigurement.

She had to go to the hospital, her mother drove her to the hospital.

She couldn't go to work because her face was bruised, she had staples in her head.

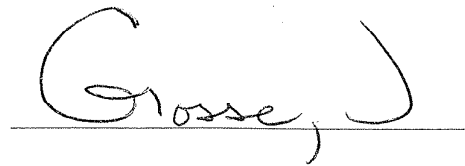
Ladies and gentlemen, that is substantial disfigurement.

....

When those staples were put into her head, when the gash on the skull was treated by the doctors, that was a substantial temporary disfigurement.

with probation violation time under RCW 9.94A.589<sup>14</sup> depends on the relative times of the commission of the underlying crimes and, in certain circumstances, on whether the trial court “expressly orders that they be served consecutively.” Here, the trial court was not asked to consider any particular case and specifically declined to order that Russell serve the current sentence consecutively to any other case. Under these circumstances, Russell has not established grounds for relief.

Affirmed.

A handwritten signature, likely "Grosse", written in black ink on a horizontal line.

WE CONCUR:

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<sup>14</sup> RCW 9.94A.589 provides in pertinent part:

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.



Becker, J.

Ajid, J.